Bank Pertanian Malaysia Bhd v MCI Bio Tech Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–2649–10 OF 2011
SYED AHMAD HELMY, ABDUL WAHAB PATAIL AND ABDUL AZIZ AB RAHIM JJCA
12 JUNE 2013

Banking — Letter of offer — Written agreements — Appeal against decision of High Court — Loan agreement — Documentation completed — Withholding of release of final drawdown by bank — Various reminders issued — Whether bank was justified in withholding of release — Whether monthly installments diligently paid

The appellant ('the bank') had issued a letter of offer to the respondent ('MCI') and the documents were executed by MCI. MCI received a letter from the bank, confirming that all documentation had been completed and that MCI could collect the funds, and proceeded to issue 'Notis Pengeluaran Pinjaman Projek Pertama'. MCI proceeded with the project. There was an additional loan, and documents were executed next. The bank had sought allocation without cost of 30% equity in MCI which was refused by the latter. Subsequently, the bank issued a letter that cl 28(d) of the letter of offer was amended to read 'Penyertaan bumiputera sebanyak 30% dalam pegangan saham syarikat hendaklah dilaksanakan sebelum pengeluaran pertama wang pinjaman dilakukan' and this was accepted by MCI. Various issues were raised against Bumiputera investors brought forward by MCI to delay release of funds. The account was transferred to Kuala Lumpur and the loan funds were released. When MCI applied for release of the sixth tranche, the bank informed the latter that it was approved 'tetapi masih tertakluk kepada kelulusan Bahagian lain yang merupakan prosedur baru'. MCI gave various reminders for the release of funds but the attempts proved futile. MCI then sought damages against the bank. The bank counterclaimed and asserted that MCI breached the conditions precedent. The High Court found for MCI and dismissed the bank's counterclaim. In the present appeal, the bank submitted that the High Court erred in holding that the bank was not justified to withhold the release of the final drawdown on the grounds that the contention by the bank that MCI did not fulfill the conditions precedent by using the monies disbursed contrary to the intended purpose under the loan agreement was not tenable; the contention by the bank that MCI had failed to pay their monthly instalments in a timely manner was untenable because the bank had failed to adduce any evidence to support the contention; and that the contention by the bank that MCI had failed to place the fixed deposits as security as required under the loan facilities was untenable because the failure of MCI to place the

fixed deposits was a direct consequence of the bank's failure in not releasing the sum.

Held, dismissing the appeal against liability, setting aside the orders of damages and ordering the damages to be assessed:

(1) Examination of the grounds of judgment showed that the High Court addressed its mind on the conduct of the parties and the inferences that might be drawn. If there had been departures and such non-compliance had been accepted without complaint or reservation, a party could ordinarily say the requirement of compliance had been waived. To restore it would require notice and would face the argument that to restore it would require, in the absence of a provision of giving reasonable notice, mutual agreement. The function of cl 6.3 was that no mutual agreement to restore was necessary (see para 17).

(2) Evidently the High Court examined the conduct of the bank's officers, bearing in mind, amending the letter of offer to add a new provision when MCI had committed itself to the project and third parties, transfer of the account to the Kuala Lumpur office before releases of funds was made, and that notice for the sixth drawdown was made, before the refusal. It could not be said that the High Court erred in not considering cl 6.3 and that it warranted appellate intervention as it did not appear that the bank and its officers were in fact relying on cl 6.3 (see paras 17–18).

(3) At the time drawdown was sought of the last tranche, no notice had been issued. Hence, the reliance upon the ground of default was an afterthought, particularly officers of the bank had conducted inspection, recommended release of funds, and the payment was approved. The High Court correctly directed itself that the role of the bank's chairman was not the issue and the question was whether the bank was justified in withholding the release of the sixth drawdown. The High Court addressed the departure in the use of the funds, and accepted the explanation outlined in MCI's explanation. There was no reason to hold that there was any error in the reasoning to warrant appellate intervention (see paras 24–26).

(4) Since the bank failed to demonstrate that the High Court had so erred in law principle fact relied upon or appreciation of facts as to result in an injustice warranting appellate intervention to remedy, the appeal against liability was dismissed (see para 39).

[Bahasa Malaysia summary

Perayu ('bank') telah mengeluarkan surat tawaran kepada responden ('MCI') dan dokumen-dokumen dilaksanakan oleh MCI. MCI menerima surat daripada bank, mengesahkan bahawa kertas kerja telah disempurnakan dan

bahawa MCI boleh mencari dana, dan seterusnya mengeluarkan 'Notis Pengeluaran Pinjama Projek Pertama'. MCI meneruskan dengan projek tersebut. Terdapat pinjaman tambahan dan dokumen-dokumen yang seterusnya dilaksanakan. Bank memohon peruntukan tanpa kos sebanyak ekuiti 30% dalam MCI yang mana ditolak oleh MCI. Seterusnya, bank mengeluarkan surat bahawa klausa 28(d) surat tawaran untuk berbunyi 'Penyertaan bumiputera sebanyak 30% dalam pegangan saham syarikat hendaklah dilaksanakan sebelum pengeluaran pertama wang pinjaman dilakukan' dan ini diterima oleh MCI. Pelbagai isu dibangkitkan terhadap pelabur-pelabur Bumiputera diketengahkan oleh MCI untuk melengahkan pelepasan dana. Akaun dipindahkan ke Kuala Lumpur dan dana pinjaman dilepaskan. Apabila MCI memohon bagi pelepasan bahagian keenam, bank memaklumkan kepada MCI bahawa ia telah diluluskan 'tetapi masih tertakluk kepada kelulusan Bahagian lain yang merupakan prosedur baru'. MCI memberikan pelbagai peringatan bagi pelepasan dana tetapi usaha-usaha nyata gagal. MCI kemudiannya memohon ganti rugi terhadap bank. Bank menuntut balas dan menghujahkan bahawa MCI telah melanggar syarat terdahulu. Mahkamah Tinggi memutuskan berpihak kepada MCI dan menolak tuntutan balas bank. Dalam rayuan ini, bank menghujahkan bahawa Mahkamah Tinggi khilaf dalam memutuskan bahawa bank tidak berjustifikasi dalam menahan pelepasan pengeluaran terakhir atas alasan hujahan oleh bank bahawa MCI tidak memenuhi syarat terdahulu dengan menggunakan wang yang dibelanjakan berbeza dengan tujuan yang diniatkan di bawah perjanjian pinjaman tidak boleh dipertahankan; hujahan oleh bank bahawa MCI telah gagal membayar ansuran bulanan tepat pada masanya adalah tidak boleh dipertahankan kerana bank gagal mengemukakan sebarang keterangan untuk menyokong hujahan; dan bahawa hujahan bank bahawa MCI telah gagal meletakkan deposit-deposit tetap sebagai cagaran seperti yang diperlukan di bahawa perjanjian pinjaman adalah tidak boleh dipertahankan kerana kegagalan MCI untuk meletakkan deposit tetap adalah akibat langsung daripada kegagalan bank dalam tidak melepaskan jumlah tersebut.

Diputuskan, menolak rayuan terhadap liabiliti, mengetepikan perintah-perintah ganti rugi dan memerintahkan ganti rugi ditaksirkan:

(1) Penelitian ke atas alasan penghakiman menunjukkan bahawa Mahkamah Tinggi telah mengarahkan mindanya kepada tindakan pihak-pihak dan inferens yang boleh disimpulkan. Jika terdapat penyimpangan dan ketidakpatuhan telah diterima tanpa aduan atau keraguan, satu pihak boleh, kebiasaannya, menyatakan bahawa keperluan kepatuhan telah diketepikan. Untuk memulihkannya akan memerlukan notis dan akan berhadapan dengan hujahan bahawa untuk memulihkannya, tanpa sebarang peruntukan yang memberi notis munasabah, persetujuan bersama. Fungsi klausa 6.3 adalah bahawa tiada persetujuan bersama untuk pemulihan adalah perlu (lihat perenggan 17).

(2) Secara jelas, Mahkamah Tinggi telah memeriksa tindakan pegawai-pegawai bank, dengan peringatan bahawa, meminda surat tawaran untuk memasukkan peruntukan baru sedangkan MCI telah mengikat dirinya kepada projek dan pihak-pihak ketiga, perpindahan akaun ke pejabat Kuala Lumpur sebelum pelepasan dana dibuat dan bahawa notis bagi pengeluaran keenam dibuat, sebelum penolakan. Tidak boleh dikatakan bahawa Mahkamah Tinggi khilaf dalam tidak mempertimbangkan klausa 6.3 dan bahawa ia mewajarkan campur tangan rayuan kerana ia tidak kelihatan bahawa bank dan pegawai-pegawainya bersandarkan klausa 6.3 (lihat perenggan 17–18).

(3) Ketika pengeluaran dibuat bagi bahagian keenam, tiada notis yang dikeluarkan. Oleh itu, sandaran pada alasan pelanggaran adalah satu fikir semula, khasnya apabila pegawai-pegawai bank telah menjalankan pemeriksaan, mengesyorkan pelepasan dana dan bayaran telah diluluskan. Mahkamah Tinggi telah dengan betul mengarahkan dirinya bahawa peranan pengerusi bank bukanlah isu dan persoalannya adalah sama ada bank berjustifikasi dalam menahan pelepasan bahagian keenam. Mahkamah Tinggi meneliti penyimpangan dalam penggunaan dana dan menerima penjelasan yang digariskan dalam penjelasan MCI. Tiada sebab untuk memutuskan bahawa terdapat kesilapan dalam alasan-alasan untuk mewajarkan campur tangan rayuan (lihat perenggan 24–26).

(4) Oleh kerana bank gagal menunjukkan bahawa Mahkamah Tinggi gagal dalam fakta prinsip undang-undang yang disandarkan atau pertimbangan fakta hingga menyebabkan ketidakadilan yang mewajarkan campur tangan rayuan untuk remedi, rayuan terhadap liabiliti ditolak (lihat perenggan 39).]

Cases referred to

Bank Bumiputra (M) Bhd v SAL Enterprise Sdn Bhd & Ors [2006] 2 MLJ 233; [2005] 4 CLJ 277, CA (refd)

Benmax v Austin Motor Co Ltd [1955] 1 All ER 326, HL (refd)

British & Benningtons Ltd v NW Cachar Tea Co [1923] AC 48, HL (refd)

Pasuma Pharmacal Corpn v McAlister & Co Ltd [1965] 1 MLJ 221, FC (refd)

Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] 1 MLJ 87, PC (refd)

Appeal from: Civil Suit No 22–362 of 2010 (High Court, Shah Alam)

DP Naban (Kumar Kanagasingam, Choo Dee Wei and Mak Hon Pan with him) (Lee Hishammuddin Allen & Gledhill) for the appellant.

M Pathmanathan (Shirin Pathmanathan with him) (Chan Leong & Co) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] Bank Pertanian Malaysia Bhd ('the bank') filed a notice of appeal as follows:

> terhadap keseluruhan keputusan Mahkamah Tinggi Shah Alam yang membenarkan tuntutan Plaintif ke atas Defendan dan juga menolak tuntutan balas Defendan ke atas Plaintif dengan kos.

[2] The respondent MCI Bio Tech Sdn Bhd ('MCI') had sought the following orders against the bank:

(a) *Kerugian dan kerosakan khas semasa tempoh kelewatan 16 bulan pertama sebanyak RM300,000;*

(b) *Kerugian dan kerosakan khas selama tempoh kelewatan semasa pengeluaran pinjaman projek dan juga semasa tempoh kelewatan 11 bulan pertama dalam jumlah berikut:*

(i) *RM725,998.58;*

(ii) *RM130,000 setakat 1 Mac 2010 dan masih berterusan; dan*

(iii) *RM310,000 setakat 31 Disember 2008 dan masih berterusan.*

(c) *Kerugian dan kerosakan am seperti yang ditaksir;*

(d) *Kerugian dan kerosakan 'Aggravated';*

(e) *Faedah dan kos-kos tindakan ini; dan*

(f) *Relief dan perintah selanjutnya yang dianggap adil dan munasabah oleh mahkamah yang Mulia ini.*

[3] The cause of action relied upon was breach of its responsibilities as the lender.

[4] It was pleaded:

(a) the bank had issued a letter of offer dated 19 October 2005 (see RR2:364);

(b) due to changes, a final letter of offer was issued on 11 July 2006;

(c) documents prepared by the solicitors for the bank were executed by MCI and was stamped 30 August 2006;

(d) on or about 28 September 2006, MCI received a letter from the solicitors for the bank confirming all documentation was completed and in order for the bank to release the funds;

(e) on or 13 October 2006, the bank confirmed the plaintiff could contact their Banting Branch to collect the funds, and issued 'Notis Pengeluaran Pinjaman Projek Pertama';

(f) MCI commenced with proceeding with the project;

(g) there was additional loan, and documentation in relation to this was executed on 30 November 2007;

(h) on or about 4 December 2007, MCI received the bank's solicitor's letter that the documentation for the additional loan was completed and in order to allow the bank to issue the funds;

(i) on or about 10 December 2007, the bank confirmed that MCI could go to its Banting Branch for the funds;

(j) sometime mid-August 2006, the bank sought allocation without cost of 30% equity in MCI. MCI refused;

(k) on 29 August 2006, the bank issued a letter that cl 28(d) of the letter of offer was amended to read:

> Penyertaan bumiputera sebanyak 30% dalam pegangan saham syarikat hendaklah dilaksanakan sebelum pengeluaran pertama wang pinjaman dilakukan.

(l) MCI accepted the amendment, as it explained in the pleading:

(i) *perjanjian untuk jual-beli keseluruhan hasil pengeluaran Projek Peptide Protein telah pun dicapai semenjak 28 November 2005 dengan ajensi luar negeri melalui syarikat pemasaran plaintif, MCI Bio-Peptide Sdn Bhd*;

(ii) *pakar-pakar asing telah pun sampai dari luar negeri siap-sedia untuk menjalankan kerja-kerja memulakan Projek Peptide Protein;* and

(iii) *plaintif telah pun membiayai dan/atau dikenakan bayaran fee pemerosesan pinjaman projek sebanyak RM5,000 dan fee guaman sebanyak RM161,114 kepada defendan dan peguamcara defendan masing-masing*;

(m) on or about various issues were raised against Bumiputera investors brought forward by MCI to delay release of funds;

(n) on 14 February 2008, and contrary to para 9.2 of the letter of offer and cl 5.1(ii) of the loan agreement, the bank issued a letter with the following:

> Adalah dimaklumkan setelah semakan dan penelitian keatas dokumen-dokumen pinjaman tuan, kami berpendapat bahawa permohonan pengeluaran wang pinjaman tuan tidak dapat dipertimbangkan. Pihak tuan dikehendaki membuat susulan dengan pihak Pejabat Tanah Sepang, Lembaga Ukur dan Pejabat Tanah dan Galian Negeri Selangor untuk mendapatkan hakmilik berasingan bagi 5 lot tanah yang dibeli dengan kadar segera.
>
> Pihak Bank memberi tempoh 4 bulan dari tarikh surat ini untuk menguruskan pindahmilik keatas nama syarikat tuan dan seterusnya gadaian keatas nama Bank Pertanian Malaysia. Kami akan hanya mengeluarkan wang pinjaman setelah kedua-dua perkara diatas disempurnakan.

(o) after meetings with the general manager and head of the Credit Department, the account was transferred to Kuala Lumpur and the loan funds were released;

(p) on 30 March 2009, MCI applied for release of the sixth tranche, the bank had told MCI that it was approved 'tetapi masih tertakluk kepada kelulusan Bahagian lain yang merupakan prosedur baru'; and

(q) MCI had given various reminders for the release of funds but to date of the filing of the claim (18 March 2010), the funds had not been released.

[5] The key parts of the assertions by MCI in support of liability were denied by the bank, and MCI was put to strict proof.

[6] Putting a party to strict proof does not affect the standard of proof, which in civil claims, is proof upon balance of probabilities.

[7] The bank counterclaimed. It was asserted that MCI breached conditions precedent:

> 30. Defendan mengatakan bahawa pada setiap masa yang material, Plaintif telah gagal memenuhi syarat terdahulu kemudahan pinjaman tersebut yang dikehendaki di bawah perjanjian tersebut, maka pengeluaran Pinjaman Berjangka (Dana TIKS2) yang berjumlah RM3,000,000-00 tidak dapat dilakukan. Malahan atas kegagalan Plaintif memenuhi syarat terdahulu pengeluaran Kemudahan Pinjaman tersebut terpaksa ditarik balik menurut klausa 6.2 Perjanjian Pinjaman tersebut.
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> 31. Melalui satu notis tuntutan daripada peguamcaranya bertarikh 2-6-2010, Defendan telah menarik balik Kemudahan Pinjaman tersebut dan menuntut jumlah keseluruhan yang terhutang setakat 30-4-2010 RM 15,944,642-40 berserta faedah daripada Plaintif.

APPEALS GENERALLY

[8] This court was informed, relying on *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326 (HL) and *Tay Kheng Hong v Heap Moh Steamship Co Ltd*

[1964] 1 MLJ 87 (PC), that it is in as good a position to evaluate the evidence and to draw inferences since the case does not involve credibility of witnesses.

[9] However, we caution ourselves that these authorities do not alter the nature of appellate jurisdiction. We remind ourselves that an appeal court does not possess original jurisdiction in the matter. That original jurisdiction is given by law to the High Court. Only where it is demonstrated that the court of original jurisdiction has:

(a) erred in law, principle, fact relied upon or in appreciation of the facts; and

(b) so erred that injustice is caused,

only then does the appellate jurisdiction arise for the appellate court to intervene and exercise the powers of the court of original jurisdiction to remedy the injustice.

[10] We recognise that from a given set of facts as often as not more than one inference may be drawn. There are various reasons including the fact that some facts may warrant being given more weight than others depending upon the particular circumstances of a case. Justice is not whitewash painted in broad strokes.

[11] That being the case, the assessment of the court of original jurisdiction must be given due weight so that appellate jurisdiction is seen to be exercised purely to remedy injustices arising from errors, and not interference based solely on the appellate judges having a different view. Otherwise, the appeals become merely a second bite of the cherry by anyone who is for any reason not happy with the decision of a court of original jurisdiction.

[12] We, therefore, proceed to examine the grounds of judgment in the light of the submissions for the appellant.

GROUNDS OF JUDGMENT AND SUBMISSION THEREON

[13] The High Court had first examined the loan agreement, and considered cll 13 and 16, and took cognisance of cl 6.1 as to conditions precedent before proceeding to consider the dispute.

[14] Adopting the summation by counsel before us for the bank, it was submitted that the High Court erred in holding that the bank was not justified to withhold the release of the final drawdown for the sum of RM3m on the following grounds:

(a) the contention by the appellant/defendant that the respondent/plaintiff did not fulfil the conditions precedent by using the monies disbursed

contrary to the intended purpose under the loan agreement was not tenable because:

(i) the appellant/defendant had previously disbursed a sum of RM15m to the respondent/plaintiff pursuant to six drawdown notices without raising the issue of non-fulfilment of the conditions precedent and thus waived their rights;

(ii) the evidence of witnesses and the contemporaneous documents showed that the respondent/plaintiff had used the monies disbursed in a manner contrary to the intended purpose under the loan agreement;

(iii) the termination notice dated 28 April 2010 issued by the appellant/defendant's then solicitors failed to specify the relevant conditions precedent that the respondent/plaintiff is said to have not fulfilled (termination notice defect); and

(iv) the appellant/defendant failed to give the respondent/plaintiff the requisite 14 days to remedy the breach of the conditions precedent (notice to remedy);

(b) the contention by the appellant/defendant that the respondent/plaintiff had failed to pay their monthly instalments in a timely manner was untenable because the appellant/defendant had failed to adduce any evidence to support the contention; and

(c) the contention by the appellant/defendant that the respondent/plaintiff had failed to place the fixed deposits as security as required under the loan facilities was untenable because the failure of the respondent/plaintiff to place the fixed deposits was a direct consequence of the appellant/defendant's failure in not releasing the sum of RM3m.

WAIVER

[15] Counsel for the bank quite correctly referred to cl 6.3 of the agreement which provided that any waiver or variation shall not preclude the bank from insisting on the borrower's compliance with such waived or varied terms and conditions. He also referred to para 2 of the Third Schedule that warranties and representations remained true and correct at the time of each advance.

[16] We agree that if the bank relied upon cl 6.3 to demand compliance with regard to the last tranche, it was entitled to do so. We found that the grounds of judgment did not show that the High Court addressed its mind on cl 6.3.

Certainly, the failure appears to be an error. The question we must address is whether the failure was an error and that it warrants appellate intervention as explained earlier above.

[17] Examination of the grounds of judgment shows that the High Court addressed its mind on the conduct of the parties and the inferences that may be drawn therefrom. Now, if there had been departures and such non-compliance had been accepted without complaint or reservation, a party can ordinarily say the requirement of compliance has been waived. To restore it would require notice and faces the argument that to restore it requires, in the absence of a provision of giving reasonable notice, mutual agreement. The function of cl 6.3 is that no mutual agreement to restore is necessary. Evidently the High Court was examining the conduct of the bank's officers, bearing in mind, amending the letter of offer to add a new provision when MCI had committed itself to the project and third parties, transfer of the account to the Kuala Lumpur office before releases of funds was made, and that notice for the sixth drawdown was made, before the refusal.

[18] Considering the matter as a whole, we cannot say that the High Court erred in not considering cl 6.3 and that it warrants appellate intervention as it does not appear that the bank and its officers were in fact relying on cl 6.3.

USAGE OF DISBURSED FUNDS

[19] On this issue, the submission navigated cl 3.1.19 that MCI warrants no event of default had occurred, cl 11.1.20 that an event of default occurs if the borrower uses the loan for a different purpose than that stated in the agreement, and cl 4.4 that MCI proposes or intends to use for a different purpose, written consent from the bank must be first obtained.

[20] Counsel relied upon *Bank Bumiputra (M) Bhd v SAL Enterprise Sdn Bhd & Ors* [2006] 2 MLJ 233; [2005] 4 CLJ 277 (CA) where it was held '… The said facility was given for specific purposes and the first respondent has to satisfy several conditions before monies under the said facility could be released. The first respondent cannot utilise the monies under the said facility for purposes other than that spelt out in the said letter of offer read together with the said amended letter of offer'. With respect, the general statement therein does not necessarily apply for the following reasons.

[21] Section 3.1 is MCI's representations and warranties and section 4.4 is as to purpose of loan. Only cl 11 is as to events of default specifically.

[22] Where the submissions run aground is that section 11.1 begins as follows before proceeding to list the events:

> The Bank may, by written notice to the Borrower declare at any time prior to any Drawdown Date that the Commitment shall be cancelled, whereupon the same shall be cancelled or at any time after the Drawdown Date declare the principal amount of the Loan, interest accrued thereon, and all other sums payable under the Loan and this Agreement to be forthwith due and payable, whereupon the same shall become so payable.

[23] At the time drawdown was sought of the last tranche, no notice had been issued. Hence, the reliance upon the ground of default is an afterthought, particularly officers of the bank had conducted inspection, recommended release of funds, and the payment was approved (see SD4).

[24] The High Court correctly directed itself that the role of the bank's chairman was not the issue and the question was whether the bank was justified in withholding the release of the sixth drawdown of RM3m, before concluding:

> Given the above, it is highly improbable that the officers who visited the site, verified the claims, recommended payment and approved the payment could have missed the fact that the factory, the very purpose for which the loan is granted, has not been built, if indeed what the defendant is contending now is genuine ie that the factory has not been built. And what needs to be borne in mind is that it is not just one officer who was involved in processing and recommending the release of the loan, but several officers. It is thus inherently improbable that 'pembiayaan disalahguna' was not detected by the officers who conducted the site visit and who recommended the earlier payments. And if there was misuse of the funds, then it is probable to expect the recommending and the approving officers to be held accountable, but nothing of that sort happened.

[25] The High Court addressed the departure in the use of the funds, and accepted the explanation outlined in MCI's explanation to the vice president of the banks new division, the Corporate Client and International Banking ('CCIB') Division.

[26] We find no reason to hold there is any error in the reasoning to warrant appellate intervention.

TERMINATION NOTICE DEFECT

[27] It was submitted one of the reasons for the judge's justification is that the letter of demand dated 28 April 2010 from the bank's solicitors did not specify the conditions precedent that have not been complied with.

[28] We have touched upon this aspect earlier above, as to what the High

Court had considered. The point about not specifying which conditions precedent was not fulfilled was mentioned in the following context:

> It must be noted that prior to CCIB taking over the approval of the loan, nothing was mentioned about the fact that the plaintiff had failed to fulfil the conditions precedent for the facility. And not until the plaintiff filed this suit on 18 March 2010 that the defendant through its solicitor's letter dated 28 April 2010 terminated the facilities purportedly pursuant to section 6.2 of the loan agreement. Even then, the defendant failed to specify which of the conditions precedent that the plaintiff has failed to fulfil.
>
> The defendant through its solicitor issued a notice to the plaintiff dated 2 June 2010. The notice states that the plaintiff has failed to pay the monthly instalments for the facility. Vide the same notice, the RMS million loan was withdrawn and cancelled and the plaintiff was demanded to pay the sum of RM15,944,642.40, the amount outstanding as at 30 April 2010 with interest which forms the defendant's counterclaim against the plaintiff.

[29] The point was mentioned but it clearly was not the sole driving force for the decision. The High Court was taking that point along with other facts for an overall view of the circumstances. The approach is not disapproved of in *British & Benningtons Ltd v NW Cachar Tea Co* [1923] AC 48 (HL). We reproduce the passage cited:

> I do not think that the case, as reported, lays it down that a buyer, who has repudiated a contract for a given reason which fails him, has, therefore, no other opportunity of defence either as to the whole or as to the part, but must fail utterly. If he has repudiated, giving no reasons at all, I suppose all reasons and all defences in the action, partial or complete, would be open to him.

[30] It was clearly a supposition rather than a point decided.

[31] In *Pasuma Pharmacal Corpn v McAlister & Co Ltd* [1965] 1 MLJ 221 (FC), the following observation by Thomson LP in the Federal Court in Singapore shows the necessity of considering the circumstances:

> Now it seems clear that if there was fraud and if it was a breach of and a breach going to the root of the original agreement Pasuma were not in any way prevented from relying on that by the terms of their letter of 20th August which was written at a time when they had grounds for suspicion but for less than certainty that a fraud had been committed.

[32] The grounds of judgment show a meticulous appreciation of the facts

before the findings were made. We find no merit in this third ground.

NOTICE TO REMEDY

[33] It was submitted that:

> 42. The Appellant/Defendant respectfully submits that the Learned Judge has erred in deciding that there was not a single document to show that the respondent/Plaintiff was reminded or notified of any breach of conditions precedent.

[34] This part of the ground of appeal refers to the following part of the grounds of judgment:

> The loan agreement requires the defendant to give 14 days to the plaintiff to rectify any breach. From the evidence, it can be seen that from 30 March 2009 when the notice for the final drawdown was delivered to the defendant until the time when CCIB begins to 'suspect' the project, there was not a single document from the defendant to show that the plaintiff was reminded or notified of any breach of the conditions precedent to the facility or of any terms of the loan agreement.
>
> Further, the defendant's notice of demand adverted to the fact that the plaintiff failed to pay the instalments. To recap, none of the defendant's witnesses testified that the plaintiff failed to pay the monthly instalments.

[35] It was submitted that:

> 43. It is to be noted that the Appellant/Defendant had, by the letters dated 2/9/2009, 4/9/2009, 9/11/2009, 19/11/2009 and 7/12/2009 requested the respondent/Plaintiff to furnish documents to determine whether the Respondent/Plaintiff had complied with the original purpose of the Loan Facilities.
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> 44. In any event, the Appellant/Defendant was contending that the respondent/Plaintiff had failed to utilize the loan for the purpose as envisaged under the Loan Agreement. This failure by the Respondent/Plaintiff was not capable of being remedied even if the Appellant/Defendant had given the respondent/Plaintiff 14 days notice to remedy the breach.

[36] It seems quite obvious that notices to provide documents to determine whether MCI had complied with the original purpose of the loan facilities, ie to determine if MCI had complied, are far different from a notice to rectify which spells out the non-compliance and gives the agreed time to rectify.

[37] Reading the grounds of judgment, we find the submission to be contrived and out of context. The letters referred to provide no support for the argument they were notices to rectify.

[38] We considered the argument at para 44 of the written submissions extracted above. Paragraph 44 makes clear the argument at para 43 was of little or not merit since the argument is that the breach was not capable of remedy. Taken in the context of the grounds extracted at para 34 of this judgment, it is clear the High Court was referring to absence of notice before CCIB purported to suspect the project but after the notice for the sixth drawdown was submitted.

[39] Since the bank as the appellant has failed to demonstrate that the High Court had so erred in law principle fact relied upon or appreciation of facts as to result in an injustice warranting appellate intervention to remedy, we dismissed the appeal against liability.

QUANTUM AND APPEAL ON DISMISSAL OF COUNTERCLAIM

[40] In respect of damages, the High Court had ordered the bank to pay to MCI:

(a) loss of profits: RM63,902,500;

(b) interest costs paid to the bank: RM1,090,510,42;

(c) loss and damages from loss of value of the company: RM16,118,000;

(d) interests thereon at 4% from 18 March 2010 to date of full settlement; and

(e) costs to be assessed.

[41] The obvious point is that if loss of profits had been recovered, an award for loss of value of the company clearly could be a duplication. The evidence is not clear that it is not.

[42] In the circumstances, we set aside the orders of damages and order the damages to be assessed.

[43] The bank had counterclaimed for repayment of the loan outstanding in the sum of RM15,944,642.40 as at 30 April 2010.

[44] The dispute in this case was the sixth tranche of RM3,000,000. There is no dispute in earlier five tranches which had been paid. To put the matter to rest, the amount should be set off against the damages to be assessed.

[45] We order each party to bear their own costs and that the deposit be refunded.

Appeal against liability dismissed, orders of damages set aside and damages ordered to be assessed.

Reported by Afiq Mohamad Nor